

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

JAMES O'BRYAN,

Petitioner,

v.

Case No. 14-11793

CARMEN PALMER

Respondent.

**ORDER DIRECTING THE CLERK OF THE COURT TO TRANSFER THE MOTION
FOR A CERTIFICATE OF APPEALABILITY, THE MOTION TO PROCEED WITHOUT
PREPAYING FEES AND COSTS ON APPEAL, AND THE MOTION TO APPOINT
COUNSEL TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH
CIRCUIT**

On February 10, 2016, the court denied Petitioner's application for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 and declined to issue a certificate of appealability or leave to appeal *in forma pauperis* on appeal. *O'Bryan v. Palmer*, No. 2:14-CV-11793, 2016 WL 520943 (E.D. Mich. Feb. 10, 2016).

On March 7, 2016, Petitioner signed and dated a Notice of Appeal, which has been docketed twice with the court. (See Dkt. ## 14,16.)

Petitioner has now filed a motion for a certificate of appealability, an application to proceed without prepaying fees and costs on appeal, and a motion for the appointment of counsel. (Dkt. ## 19, 20, 21.) For the reasons that follow, the court will order the Clerk of the Court to transfer Petitioner's motions to the United States Court of Appeals for the Sixth Circuit.

The proper procedure when a district court denies a certificate of appealability is for the habeas petitioner to file a motion for a certificate of appealability before the appellate court in the appeal from the judgment denying the petition for writ of habeas corpus or the motion to vacate sentence. See *Sims v. U.S.*, 244 F. 3d 509 (6th Cir. 2001)(citing Fed. R.App. P. 22(b)(1)). The court has already denied Petitioner a certificate of appealability. Petitioner should request a certificate of appealability from the Sixth Circuit. The court, in the interests of justice, will order that Petitioner's motion for a certificate of appealability be transferred to the United States Court of Appeals for the Sixth Circuit.

The court further orders the Clerk of the Court to transfer Petitioner's remaining motions to the Sixth Circuit, in light of the fact that Petitioner has filed a notice of appeal.

A notice of appeal generally "confers jurisdiction on the court of appeals and divests the district court of control over those aspects of the case involved in the appeal." *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985)(citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)(per curiam)); See also *Workman v. Tate*, 958 F. 2d 164, 167 (6th Cir. 1992). Petitioner's notice of appeal divests this court of jurisdiction to consider his motions to proceed without prepayment of fees and costs on appeal and for the appointment of appellate counsel. See *Murray v. Artl*, 189 F. App'x 501, 504 (7th Cir.2006); *Glick v. U.S. Civil Service Com'n*, 567 F. Supp. 1483, 1490 (N.D. Ill. 1983); *Brinton v. Gaffney*, 560 F. Supp. 28, 29-30 (E.D. Pa. 1983). Because jurisdiction of this action was transferred from the district court to the Sixth Circuit Court of Appeals upon the filing of the notice of appeal, Petitioner's remaining motions would be more appropriately addressed to the

Sixth Circuit. See *Grizzell v. State of Tennessee*, 601 F. Supp. 230, 232 (M.D. Tenn. 1984).

In the interests of justice, a district court has the discretion, pursuant to 28 U.S.C. § 1631, to transfer a case or pleading that has been improperly filed in that court to the proper court. See *Roman v. Ashcroft*, 340 F.3d 314, 328 (6th Cir. 2003). Accordingly,

IT IS ORDERED that the Clerk of the Court TRANSFER the “Motion for a Certificate of Appealability” (Dkt. # 19), the “Application to Proceed Without Prepaying Fees and Costs on Appeal” (Dkt. # 20), and the “Motion To Appoint Counsel” (Dkt. # 21) to the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1631.

s/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: June 27, 2016

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, June 27, 2016, by electronic and/or ordinary mail.

s/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522